LE COPY

Office Supreme Court, U.S.
FILED
DEC 2 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 351

THE BROWN PAPER MILL COMPANY, INC., *Petitioner,*
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO MEMORANDUM FOR THE RESPONDENT

I

The Memorandum for the Respondent states, with respect to the power of a Court of Appeals to review a § 722 case where the Tax Court made ultimate findings contrary to evidentiary findings, (p. 13):

> "There is at the present time, therefore, a seemingly square conflict of decisions on this point among the courts of appeals."

Respondent also admits that "The issue presented in this case is presented also on the petition for a writ of certiorari now pending before the Court in *Crowell-Collier Publishing Co.* v. *Commissioner,* No. 500, this Term."

The Respondent then asks this Court to delay action on the petition in the case at bar and in the *Crowell-Collier* case, because of his hope that the Ninth Circuit will reverse its prior decision in the *Helms Bakeries* case. Petitioner feels this request should not be granted because respondent's request is unreasonable.

Action by this Court should not be delayed because of possible action by a circuit court at some undetermined future date.

II

The Memorandum for the Respondent brushes off the conflict with the Second Circuit in *George Kemp Real Estate Co.* v. *Commissioner,* 205 F. (2d) 236 (p. 11), despite the fact that:

(a) the only question before the Tax Court in the *Kemp* case was the claim that the taxpayer was entitled to § 722 relief. The Tax Court denied relief on the ground that a decision denying § 722 relief for a prior year estopped the taxpayer from a trial on the merits for later years. The Second Circuit accepted jurisdiction to review the Tax Court decision because the Tax Court based its decision on estoppel, so "The decision was not, in the language of the statute, 'necessary solely by reason of section * * * 722.'"

(b) The Fifth Circuit in the case at bar states "The question of reviewability may not be completely free

from doubt, and taxpayer's contention receives some oblique support from the second *Kemp* case, 205 F. (2d) 236, which is somewhat analogous."

III

The Memorandum for the Respondent likewise brushes off the conflict with the express language of the 1954 Code (R. 15). It says that petitioner's argument, if valid, would have the anomalous result of depriving the Tax Court of its jurisdiction in § 722 cases. The Respondent overlooks advising the Court that § 7851 (b) (1)[1] of the 1954 Code specifically provides that existing rights and liabilities are not affected by the repeal of any provision of the 1939 Code. The Committee reports on the 1954 Code state:[2]

> "* * * all rights and liabilities under the 1939 Code will continue and may be enforced as if the repeal had not been made. For example, the liability for any tax imposed by the 1939 Code prior to its repeal will continue until paid notwithstanding such repeal."

The 1954 Code made procedural changes and states that the new judicial proceedings apply after the

[1] The subsection states:

"Existing rights and liabilities—the repeal of any provision of the Internal Revenue Code of 1939 shall not affect any act done or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause, before such repeal; but all rights and liabilities under such Code shall continue and may be enforced in the same manner, as if such repeal had not been made."

[2] Ways and Means Committee Report (p. 443) and the Finance Committee Report (p. 626).

effective date of the Code "notwithstanding any contrary provisions of such code." § 7851 (a) (6) (C).

Conclusion

Admitted conflict exists on one issue. We have demonstrated that conflict exists on other issues. The petition for a writ of certiorari should be granted to resolve these conflicts.

Respectfully submitted,

ROBERT ASH
1921 Eye Street, N.W.
Washington 6, D. C.
Attorney for Petitioner

December 2, 1958